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State not vicariously liable for sexual assaults committed by teacher – *Lepore* revisited

***JK v State of New South Wales* [2014] NSWSC 1048**

Overview

The State of New South Wales (the State) successfully argued before the New South Wales Supreme Court (judgment delivered 14 August 2014) that QR (the teacher) should make a substantial contribution towards a consent judgment (the settlement) the State achieved with JK (the plaintiff) who was sexually assaulted by the teacher.

The decision of her Honour Harrison AsJ importantly considers the vexed question of when an institutional body may be vicariously liable for the criminal conduct of its employees – which was left open by the High Court in *State of New South Wales v Lepore*.

Facts

The plaintiff sought damages from the State for psychiatric injury, in the State's guise as the authority responsible for the school she attended and employer of the principal / deputy principal of that school. The plaintiff alleged she suffered psychiatric injury as a result of a number of sexual assaults committed by the teacher, who was employed at the school.

The teacher was also a party to the plaintiff's claim and was not a party to the settlement. The State specifically refused to sign a notice of discontinuance, served by the plaintiff against the teacher, so that the issues in dispute (below) could be further ventilated.

The assaults occurred between 2002 and 2004, when the plaintiff was between 13 and 15 years of age. The teacher was arrested in 2006, and was charged with one count of aggravated indecent assault occurring on school premises and within school hours, and 14 counts where the offences occurred off school premises and outside of school hours. The teacher pleaded guilty to the charges, and received a custodial sentence.

The settlement was for the sum of \$525,000 inclusive of costs. The State sought a complete indemnity with respect to the settlement from the teacher.

The dispute between the State and the teacher proceeded to hearing. The teacher was self-represented at the hearing.

Three main issues were determined by her Honour:

- ▲ Was the settlement reasonable (issue 1)?

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- ▲ Should the teacher indemnify the State (issue 2)?
- ▲ How should contribution be apportioned between the teacher and the State (issue 3)?

Issue 1

This issue was dealt with briefly.

Her Honour found that, taking into account the medical evidence of the plaintiff's psychiatric injury and her age when the sexual assaults occurred, the settlement (including with respect to costs) was reasonable.

Issue 2

The State's success or failure, in terms of issue 2 but also generally in this matter, turned on whether it ought to be held vicariously liable for the actions of the teacher.

In reaching the conclusion that the State was not vicariously liable for the actions of the teacher, her Honour adopted the following reasoning:

- ▲ The School did not owe a non-delegable duty to the plaintiff for the criminal actions of the teacher
- ▲ The State correctly conceded that a school authority, in certain circumstances, may be vicariously liable for criminal acts – including sexual assaults – committed by a teacher
- ▲ The State argued that vicarious liability should be imposed only if the conduct was done with the intention to 'further the interests of' or 'perform the duty for' the employer – or if it at least appeared to be done for that purpose or with the employer's authority
- ▲ That the majority of the assaults occurred away from the school and/or outside of school hours did not conclusively determine the issue. It was still necessary to consider whether the assaults occurred 'in the course of employment'
- ▲ There is no clear majority view in *Lepore* as to when a school could be vicariously liable for the criminal conduct of a teacher. The High Court detailed at least four, and perhaps five, different formulations as to when a school may be vicariously liable.
- ▲ The State submitted that determining the issue required a consideration of the relationship and connection between the acts performed and the nature / scope of the teacher's employment. The State asserted that to do so her Honour ought to consider the following:
 - ▲ Whether the criminal acts were authorised modes of appropriate and authorised acts – see Gleeson CJ, Gaudron and Kirby JJ in *Lepore*
 - ▲ Whether the wrongful acts were performed in '*the intended pursuit of the employer's interests or in the intended performance of the contract of employment*' or '*in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out to the employee as having*' – see Gummow and Hayne JJ in *Lepore*
- ▲ The State asserted that properly assessed the teacher's conduct did not occur in the course of, and did not arise out of, his employment as a teacher at the school



- ▲ The teacher made a number of submissions in an attempt to convince her Honour that the State ought be found to be vicariously liable for his actions. Namely:
 - ▲ By September 2003 other teachers were aware that the plaintiff had a crush on him. He was subsequently approached by a counsellor at the school, and it was suggested that he should not have contact with the plaintiff.
 - ▲ He was thereafter instructed to swap roll call classes with another teacher (the plaintiff was a member of his roll call class). Nevertheless, at the start of 2004 the plaintiff was placed in a computer studies class that he taught.
 - ▲ The head teacher of the school had bullied and intimidated him, this conduct was not (despite his complaint) dealt with in a meaningful fashion and he had lost confidence as a teacher and developed a major depressive illness that had affected his judgement. No medical evidence was produced to support the allegation that the teacher indeed had such an illness.
 - ▲ The plaintiff was already depressed before the assaults did occur. NOTE - The State counter argued that the teacher's knowledge of such depression, which the school and the principal / deputy had not been informed of, supported the claim for indemnity / contribution.
 - ▲ The plaintiff's academic results improved whilst he was her teacher, and any reduction in the plaintiff's scholastic achievement was affected by other factors. Her Honour noted, however, that the plaintiff's claim did not solely involve her academic performance.
 - ▲ He was already paying the plaintiff criminal restitution via instalments
 - ▲ He presently had a difficult living and family situation, and his son had medical problems that he needed to financially contribute towards solving
- ▲ The teacher's submissions were primarily without merit and self-serving
- ▲ The teacher knew he was engaging in criminal conduct and that such conduct was in breach of his contract of employment
- ▲ The teacher's conduct was serious and wilful, and he had deliberately attempted to conceal it from the school
- ▲ Awareness of a crush is an entirely different proposition to being aware of sexual assaults taking place
- ▲ That all the facts and circumstances of this matter were not the subject of a full-blown trial between the plaintiff, the State and the teacher makes it difficult to determine whether or not the State would have (if a full-blown trial had occurred) been found to be vicariously liable for the acts of the teacher. Her Honour noted that at such a trial the teacher may have argued that:
 - ▲ After the school became aware of the crush it should have more closely monitored how the teacher and the student interacted during school hours, and should not have placed the plaintiff in a class taught by the teacher
 - ▲ The school must bear some responsibility for the sexual assault that occurred at school (as opposed to the assaults that occurred outside the school)

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- ▲ Her Honour, however, concluded that:
 - ▲ It was unlikely that a court would have found that there was a sufficient connection between the teacher's employment and his criminal conduct
 - ▲ It was more likely that a court would have found that the State was not aware of the assaults committed outside of the school premises / hours, and was not vicariously liable for the teacher's conduct
 - ▲ The teacher should consequently indemnify the State.

Issue 3

Based upon the arguments that her Honour suggested the teacher might have made against the State at a full-blown trial (see above), her Honour determined that whilst primary liability should rest with the teacher, it was just and equitable that the State should bear some contribution.

Her Honour consequently ordered the teacher to pay 90% of the settlement.

Comment

The decision is topical due to the ongoing Royal Commission into Institutional Responses to Child Sexual Abuse (the Commission). The findings of that Commission, or at the very least the public awareness and significant concern that has flown and will flow from it, may have a bearing upon how the case law in this area develops going forward.

JK is helpful as it provides some practical guidance as to how a court may consider the various principles enunciated by the High Court in *Lepore*, when determining whether an institutional body may be vicariously liable for the criminal acts of its employees.

The decision reaffirms the commonly held view that it will be difficult to successfully argue that, in such contexts, an employer should be held to be vicariously liable for an employee's criminal conduct.

However, 'difficult' does not mean 'impossible', and the decision must be viewed in the following context:

- ▲ The teacher was self-represented at the hearing
- ▲ A full-blown hearing of the plaintiff's allegations against the State and the teacher did not occur.

It is hard to know what facts may have been elicited at a full-blown hearing, but one wonders whether a different result may have been achieved (even in the dispute between the State and the teacher before her Honour) had the teacher been legal represented, and his lawyers presented evidence and made arguments going directly to the application of the principles enunciated by the High Court in *Lepore*.



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It is also specifically worth noting that it is not entirely clear why 10% responsibility was attributed to the State – and specifically whether her Honour thought that at a full-blown hearing the State might have been found vicariously liable for the assault that occurred at the school and within school hours, or whether the State's contribution arose from a more direct cause.

In short, when an institutional body will be found vicariously liable for the criminal conduct of an employee remains a 'watch this space' area of law.



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